

MEMORANDUM OF LAW

DATE: May 29, 1991

TO: Ralph Shackelford, Purchasing Agent

FROM: City Attorney

SUBJECT: Low Bidder's Failure to Submit Bonds, Etc. - Award to Next Low Bidder

By memorandum dated May 10, 1991, you have informed us that the Purchasing Department has been experiencing frequent problems with contractors who fail to supply bonds, insurance certificates, and executed contract documents within the time specified in bidding documents. This problem has resulted in costly delays to important projects. Accordingly, this memorandum answers the following questions upon which you have requested our opinion:

QUESTIONS

1. May the City proceed to award or recommend award of a construction contract or service agreement to the next low bidder in cases when the lowest monetary bidder fails to provide required bonds, proof of insurance, or other documents within a reasonable period of time?
2. Assuming an affirmative answer to the first question, would the City be required to afford the lowest monetary bidder with notice and an opportunity to be heard by the City Council prior to proceeding with the award to the next low bidder?

ANSWERS

1. Yes. Construction contracts and most service contracts are required to be given to the lowest responsible bidder, and a bidder's ability and willingness to timely meet bidding requirements relative to bonding and insurance have bearing on the determination whether the contract can be responsibly performed by that bidder. Prior to formation of contract, if a bidder cannot or will not furnish the requisite security and insurance in the time directed by the invitation for bids, the City in its sound discretion may determine that the contractor is not responsible and proceed to award the next lowest bidder who satisfies all criteria.
2. Due process principles require that a low monetary bidder be given notice and an opportunity to be heard on the question of his or her responsibility before the City may proceed to award a contract to the next lowest bidder who is responsible. The City Council itself would not necessarily have to give this notice and provide the forum for hearing;

rather, the Council may by resolution delegate authority to the Purchasing Agent to determine who is the lowest responsible bidder, and to hear and weigh the explanations of any lower monetary bidder who is not recommended for award. Although formal findings of nonresponsibility are not required by law, a conclusive determination to this effect should be made to make any action adversely affecting a low bidder readily defensible.

ANALYSIS

San Diego City Charter (Charter) section 94 requires all municipal construction contracts to be awarded to the lowest responsible bidder. Public Contract Code section 20162 also requires that city construction contracts exceeding a cost of Five Thousand Dollars (\$5,000) to be awarded to the lowest responsible bidder. If the subject of the contract is a municipal affair, the charter provision controls; and if the project is a matter of statewide concern, the general law controls. *R & A Vending Services, Inc. v. City of Los Angeles*, 172 Cal. App. 3d 1188, 1191-1192 (1985). Regardless, it is the law that almost without exception construction contracts must be given to the lowest responsible bidder. The same is true for City service contracts which exceed Twenty Thousand Dollars (\$20,000), where Charter section 35 and San Diego Municipal Code (SDMC) section 22.0512 direct award to the lowest bidder who furthermore is responsible.

The definition of the term "lowest responsible bidder" is the same under either the Charter or general law: it includes the attribute of trustworthiness, and it also has reference to the quality, fitness, and capacity of the low bidder to satisfactorily perform the proposed work. *City of Inglewood - Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal. 3d 861, 867 (1972); See also, *West v. Oakland*, 30 Cal. App. 556, 560 (1916); *R&A Vending Services*, 172 Cal. App. 3d at 1193. In determining the responsibility of a contractor under these definitional criteria, the public entity "has been invested with discretionary power as to which is the lowest responsible bidder . . . such discretion will not be interfered with by the courts in the absence of direct averments and proof of fraud." *Inglewood*, 7 Cal. 3d at 867; See also, *West*, 30 Cal. App. at 560-561; *R&A Vending Services*, 172 Cal. App. at 1193.

The question at hand involves consideration of a bidder's failure to submit bonds, insurance certificates, or other documents within the time stipulated in the bid solicitation, which is a part of the contract. In distilled substance, the standard specification in City construction contracts provides that the awarded bidder must deliver acceptable bonds and proof of insurance to the City within ten (10) calendar days from the date contract documents are received for execution. Failure to do so, it is further provided, could result in forfeiture of the bid bond while the City proceeds to award the contract to the next lowest and responsible bidder. Subject to the due process and contract formation concerns

discussed below, this provision appears to be legally enforceable. Clearly, the contractor's ability and willingness to timely provide the required security and proof of insurance are extremely strong indicia of financial fitness to perform the work, and may also relate to the issue of general trustworthiness. The City, therefore, may use sound discretion to determine the significance of any failure on the part of the contractor to timely furnish bonds, insurance certificates, or other documents which must be filed as conditions precedent to the performance of the contracts. Such failures may serve as legitimate bases for a finding of nonresponsibility.

A point of caution is in order, however, with respect to the wording of the contract provision pertaining to the time when bonds and proof of insurance must be submitted. Presently, the provision reads: "The bidder to whom award is made shall execute a written contract . . . and furnish good and approved bonds and insurance certificates . . . within ten calendar days" (Emphasis added.) The emphasized wording presumes that no obligation to furnish the bonds and insurance certificates arises until after award is made. It should be carefully noted that it is the City's acceptance (award) of a bid, and not formal signing of contract documents, which make the contract. *Lee C. Hess Co. v. City of Susanville*, 176 Cal. App. 2d 594, 599 (1959). Thus, under the present wording, the failure to timely supply the bonds and insurance certificates is a contract performance issue relating to breach of contract rather than a contract formation issue relating to the acceptability of a bid. For the bond and insurance submittals to have bearing on the initial determination whether the bidder is responsible, all bidding and contract documents should be revised to leave no doubt that no award is given until those matters are satisfied. This may be best accomplished by merely providing that award is recommended, rather than made, pending submission of acceptable surety and insurance documents.

We now turn to discuss the procedures that must be followed before the City may proceed to award a contract to a party other than the low monetary bidder. In this respect the issue is due process, and while the subject has been covered in several cases, the guiding principles are most authoritatively set forth by the California Supreme Court in the *Inglewood* decision:

We hold that prior to awarding a public works contract to other than the lowest bidder, a public body must notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him the opportunity to rebut such adverse evidence, and permit him to present evidence that he is qualified to perform the contract. We do not believe, however, that due

process compels a quasi-judicial proceeding prior to rejection of the low monetary bidder as a nonresponsible bidder.

Inglewood, 7 Cal. 3d at 861.

The concluding sentence from the foregoing excerpt presents an issue as to what procedure will suffice to satisfy due process requirements. It is made clear by Inglewood that a quasi-judicial proceeding, with trial-type procedures including pleadings, cross examination of witnesses, and formal findings, is not required. See also, *Cyr v. White*, 83 Cal. App. 2d 22, 28 (1947); *West v. Oakland*, 30 Cal. App. at 562 (not necessary for City Council to make a specific finding or record that the lowest bidder was not the lowest responsible bidder). However, it has also been held that some sort of definitive determination is required. In the recent case of *Boydston v. Napa Sanitation District*, 222 Cal. App. 3d 1362 (1990), the court upheld a writ commanding the public entity to determine whether the adversely affected bidder was qualified (responsible). There it was stated that "Each agency awarding a public contract must determine whether the low . . . bidder is qualified to perform the contract." *Id.* at 1370 (citing *Inglewood*, 7 Cal. 3d at 870).

We therefore advise that prior to awarding a contract to other than the lowest bidder, the City must first notify the low bidder in writing that failure to timely provide the bonds and proof of insurance has brought his or her responsibility into question, and that an opportunity will be afforded within a reasonable and certain time to present evidence as to why that contractor should not be found nonresponsible on such account. If the low bidder does not respond to this notice or gives unsatisfactory explanations, a conclusive determination of nonresponsibility may be made.

We do not believe that the City Council itself would necessarily be required to entertain the low bidder's counter-arguments and make the determination of nonresponsibility. The City Council resolutions relative to construction contracts routinely delegate authority to the Purchasing Agent, via the City Manager, to award the lowest responsible bidder. Implicit in such a delegation is an authorization for the Purchasing Agent to determine which bid is monetarily low and to ascertain whether its offeror is responsible. We have the opinion that the Purchasing Agent, if acting under such a Council resolution, would have the authority to notify the low bidder of potential adverse action, to provide an opportunity for that bidder to respond, to hear and weigh any response to that notice, and to exercise sound discretion on behalf of the City in making a conclusive determination.

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By

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